Supreme Court, U.S.
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No. 98-1905

In The

Supreme Court of the United States

JESSIE TOMPKINS, et al.,

Petitioners,

v.

ALABAMA STATE UNIVERSITY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT STATE OF ALABAMA

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QUESTIONS PRESENTED

1. Must a District Court permit an individual, who is a member of a certified class of plaintiffs in an ongoing desegregation action, to initiate a new and separate civil action against some of the defendants in the original action for the purpose of opposing the implementation of a portion of the final judgment rendered in favor of the plaintiff class in the original action?

2. Did the District Court for the Northern District of Alabama abuse its discretion by dismissing the complaint filed by the petitioners in this case (all of whom are members of the certified class of plaintiffs in *Knight v. State of Alabama*)?

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BRIEF IN OPPOSITION FOR RESPONDENT STATE OF ALABAMA

The State of Alabama ("the State"), one of the Respondents in the above-entitled action, respectfully requests this Honorable Court to deny the petition for writ of certiorari filed by the Petitioners Jessie Tompkins and others ("the Tompkins Plaintiffs"), in which they seek review of the decision of the Court of Appeals for the Eleventh Circuit affirming the opinion rendered in this case by the United States District Court for the Northern District of Alabama. The District Court's opinion is reported at 15 F.Supp.2d 1160 (N.D.Ala. 1998).

STATEMENT OF THE CASE

The State incorporates by reference the statement of facts in the opinion of the District Court below in *Tompkins v. Alabama State University*, 15 F.Supp.2d 1160 (N.D.Ala. 1998).

The decree rendered by the United States District Court for the Northern District of Alabama in *Knight v. State of Alabama*, 900 F.Supp. 272 (N.D.Ala. 1995) [herinafter cited as *Knight III*], is in no sense whatsoever a "consent decree"; rather, it is a remedial decree representing the judgment of the District Court entered against the defendants (including, among others, the State) in favor of the plaintiffs (including, among others, the Tompkins Plaintiffs). *See, Knight III*, 900 F.Supp. at 374.

Contrary to the implication of the Tompkins Plaintiffs' brief (Pet'rs.' Br. at i, 13-15), the District Court's decree in *Knight III* does not categorically exclude black

students from all participation in the Diversity Scholarship Program ordered by the Court for Alabama State University ("ASU"): "The most significant but not exclusive criteria [*sic*] in awarding scholarships under this Decree must be the diversification of the student bodies at Alabama State University and Alabama A & M University." *Knight III*, 900 F.Supp. at 357. Rather, the District Court excluded black students categorically in only one narrow area:

> The Court will specifically require, however, that the diversity scholarship criteria provide that any recipient whose award includes room and board, shall be of a race other than African-American. The Court believes that this narrow restriction on the availability of Court-ordered Diversity Scholarship assistance is required to aid the University in meeting its constitutional duty to desegregate and to ensure that the scholarship funds are applied to an appropriate use.

Knight, 900 F.Supp. at 382. This limited exclusion implies that a black student can be a recipient of an award that does not include room and board, i.e., an award covering only tuition, fees and books. Thus, although the manner in which ASU has implemented the Diversity Scholarship Program has precluded the participation of black students, the District Court's decree in *Knight III* categorically precludes black students from receiving diversity scholarships only when those scholarships include room and board.

Ignoring this distinction, the Tompkins Plaintiffs broadly oppose the implementation of the Diversity Scholarship Program at ASU and, to that end, are attacking

in this case the validity of that portion of the 1995 decree in *Knight III* that provided for that Program. However, the Tompkins Plaintiffs are already also pursuing the same claim in *Knight v. State of Alabama*, CV-83-M-1676-S. They have filed a motion to intervene in *Knight*; limited discovery has been conducted on the issue of the adequacy of representation of the Tompkins Plaintiffs in *Knight* by the named class representatives; and briefs have been filed with, and oral arguments heard by, the District Court on the matter of intervention by the Tompkins Plaintiffs.

REASONS FOR DENYING THE WRIT

I. The allegedly conflicting decisions are distinguishable on their facts.

The Tompkins Plaintiffs erroneously assert that the opinion of the District Court (and that of the Court of Appeals) "is a direct affront to this Court's decision in *Martin v. Wilks*." (Pet'rs.' Br. at 19.) *See, Martin v. Wilks*, 409 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989).

In *Tompkins*, the District Court followed controlling precedent established by the Court of Appeals for the Fifth Circuit in *Hines v. Rapides Parish School Board*, 479 F.2d 762 (CA5 1973), and confirmed by subsequent cases.[1] *Rivarde v. Missouri*, 930 F.2d 641 (CA8 1991); *Miller v. Board of Education*, 667 F.2d 946 (CA10 1982); *see also, Bradley v. Pinellas County School Board*, 961 F.2d 1554

[1] The Eleventh Circuit adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (CA11 1981).

(CA11 1992); *Pate v. Dade County School Board*, 588 F.2d 501 (CA5 1979), *cert. denied*, 444 U.S. 835, 100 S.Ct. 67, 62 L.Ed.2d 44 (1979). In *Hines*, the plaintiffs sought to challenge in a separate lawsuit an active desegregation plan approved by the district court. *Hines*, 479 F.2d at 763. The district court, noting that the original plaintiffs were still active, dismissed the action and the Court of Appeals affirmed. *Id.* The appellate court held that the *Hines* plaintiffs who sought to challenge the desegregation plan would have to petition the district court to allow them to intervene in the original desegregation case. *Id.* at 765. "If the court determined that the issues these new plaintiffs sought to present had been previously determined or if it found that the parties in the original action were aware of these issues and completely competent to represent the interests of the new group, it could deny intervention." *Id.* at 765.

Thus, *Hines* establishes that when a party seeks to challenge any aspect of a school desegregation case over which the district court has retained jurisdiction, the court may require that challenge to be accomplished (if at all) by means of intervention in the original desegregation case and not by means of an independent action. *Hines*, 479 F.2d at 763-65. The rationale for this rule is the desire to permit plaintiffs to present complaints regarding a desegregation plan "without fostering a multiplicity of new lawsuits over the same complicated and emotional issues which have already once been fought out in an all too lengthy court battle." *Hines*, 479 F.2d at 765. Applying *Hines*, the District Court in this case dismissed the Tompkins Plaintiffs' complaint, stating they could seek to intervene in the ongoing case of *Knight v. State of Alabama*.

Nothing in *Hines* conflicts with, or has been even tacitly or implicitly overruled by, *Martin*. In *Martin*, white firefighters were first denied intervention into a Title VII suit filed by black individuals and the National Association for the Advancement of Colored People against the City of Birmingham, Alabama, and the Jefferson County Personnel Board; they subsequently brought an independent action seeking to attack collaterally the judgment in the Title VII suit in which they had never been parties. *Martin*, 490 U.S. at 761-69. The District Court dismissed the firefighters' independent lawsuit for the reason that the City and Board could not be liable for discriminating in accordance with the Court's decrees. *Id.* at 760-61. The Court of Appeals for the Eleventh Circuit reversed the District Court, and this Court affirmed the decision of the Court of Appeals. *Id.* at 761, 768-69.

This Court held that a person who is not a party to an action cannot, under the Federal Rules of Civil Procedure, be obligated to intervene (or to attempt to intervene) in that action; rather, the plaintiff is effectively required to join that person as a defendant. *Martin*, 490 U.S. at 761. A non-party – "a stranger to the proceedings" – has no duty to intervene, nor is he bound – i.e., his own rights are not concluded – by a judgment or decree in a lawsuit to which he is not a party. *Id.* at 761. Rather, "a party seeking a judgment binding on another cannot obligate that person to intervene; he must be joined." *Id.* at 763. This Court therefore concluded that the firefighters were entitled to bring an independent action to attack collaterally the judgment – entered in the form of a consent decree – in the Title VII suit. *Id.* at 761-69. Not to permit such a collateral attack by a non-party on a consent decree

would foreclose any avenue by which the non-party could represent his own rights or interests. *Id.* Nothing in *Martin* even remotely suggests, however, that a member of a plaintiff class has an affirmative right to file a new lawsuit for the purpose of objecting to a decree of the District Court rendered in favor of the very class of which he is a member.

Hines and *Martin* therefore clearly do not conflict; rather, they both support the same goal: permitting those whose interests were supposedly not represented in a matter to have their day in court. *Hines* states that, in an ongoing school desegregation case, intervention is the appropriate means for addressing a complaint arising out of the implementation of a desegregation order, whether raised by a party, such as an absent class member, or by a non-party. *Martin*, by contrast, states only that if a non-party, whose interests were clearly not represented in the original lawsuit, is summarily denied intervention, he should be able to attack a consent decree entered in the original lawsuit in an independent action. These principles are entirely compatible with each other. These two cases do not contradict each other.

The District Court in *Tompkins* simply followed applicable precedent. *Martin* is irrelevant to this case: The 1995 decree which the Tompkins Plaintiffs now seek to overturn is not a "consent decree." Unlike the firefighters in *Martin*, the Tompkins Plaintiffs are not non-parties to the *Knight* case; to the contrary, they are members of a certified class of plaintiffs in *Knight*. The original case, *Knight v. State of Alabama*, is a school desegregation case over which the District Court still retains jurisdiction. In dismissing their complaint, the District Court did not

thereby prevent the Tompkins Plaintiffs from asserting their interests. Indeed, the Tompkins Plaintiffs are currently attempting to intervene in *Knight v. State of Alabama*. There is therefore no reason for this Court to issue a writ of certiorari in this case.

II. There is no conflict between the opinions of the Courts of Appeals for the Tenth and Eleventh Circuits.

The Tompkins Plaintiffs assert that there exists a "split" between the Courts of Appeals for the Tenth and Eleventh Circuits on the issue of whether absent class members can collaterally attack an order in a school desegregation case. (Pet'rs.' Br. at 22.) The Tompkins Plaintiffs state that *Garcia v. Board of Education*, 573 F.2d 676 (CA10 1978), conflicts with the opinion of the District Court in this case. (Pet'rs.' Br. at 22.) In *Garcia*, the Court of Appeals held that principles of *res judicata* applied to bar absent class members from collaterally attacking the judgment in a school desegregation case, because the absent class members had been *adequately* represented in the original case. *Garcia*, 573 F.2d at 678-80. According to the Tompkins Plaintiffs, *Garcia* implies that if the absent class members could have shown *inadequate* representation, then the Court of Appeals would have allowed them to collaterally attack the judgment in the school desegregation case. (Pet'rs.' Br. at 22.)

However, four years later, the Court of Appeals for the Tenth Circuit foreclosed any such implication in *Miller v. Board of Education of Topeka*, 667 F.2d 946 (CA10 1981). Citing *Hines*, *Miller* held that, in order to challenge

the school board's compliance with *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), black students could be required to intervene in the existing, ongoing school desegregation case, rather than being allowed to bring an independent action. *Miller*, 667 F.2d at 947-48.

The Court of Appeals for the Tenth Circuit therefore is in agreement with the Court of Appeals for the Eleventh Circuit on the very issue presented by the petitioners for review. There is no "conflict between the Circuits" and therefore no reason to issue a writ of certiorari in this case.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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